No. 89-459

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DELTA AIR LINES, INC.,

Petitioner,

v.

ASSOCIATION OF FLIGHT ATTENDANTS, AFL-CIO,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

REPLY BRIEF

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REPLY BRIEF

Petitioner Delta Air Lines, Inc. ("Delta") files this Reply Brief pursuant to Rule 22.5 of the Rules of this Court.

1. *Mootness Conflict.* Perhaps the most astonishing aspect of the Brief In Opposition of the Association of Flight Attendants ("AFA's Brief") is contained in footnote 5 where AFA asserts that the decision in the parallel litigation to this case, *IBTCHWA, Local No. 2702 v. Western Airlines, Inc.*, 854 F.2d 1178 (9th Cir. 1988), Pet., at 64a, is not in conflict with the D.C. Circuit's decision below. By declaring that the D.C. Circuit had considered the Ninth Circuit's decision to involve only a mootness finding concerning the unions' request for post-merger specific performance to prohibit the merger from being consummated and to compel arbitration (AFA's Brief, at 9 n.5), AFA flatly contradicts the opinion of both the Ninth and the D.C. Circuits.

Not only did the D.C. Circuit make no such finding, but its decision expressly acknowledged the irreconcilable conflict between the two circuits. The D.C. Circuit noted that the very same damages argument relied on by AFA "was indeed made in the briefs before the Ninth Circuit . . . [and] [w]ere the Ninth Circuit decision binding precedent in this circuit, it might give us greater cause for concern, since its judgment necessarily, if implicitly, rejected all of the arguments that the unions made." 879 F.2d, at 910, Pet., at 9a. In adopting the same arguments that were rejected by the Ninth Circuit, the D.C. Circuit has created a direct conflict that must be resolved by this Court.

2. *Jurisdiction Conflict.* For the reasons set forth in Delta's Petition, at 12-21, AFA's attempt to distinguish the previously unbroken line of circuit cases upholding the exclusive jurisdiction of the National Mediation Board ("NMB") over representation issues in airline mergers and acquisitions also fails. In a further attempt to avoid this second conflict between the D.C. Circuit decision and other circuit decisions, the AFA's Brief at pages 6 to 7 cites a number of inapplicable cases decided under the National Labor Relations Act ("NLRA") and relies in particular on *W.R. Grace Co. v. Local Union 759*, 461 U.S. 757 (1983), and *Belknap, Inc., v. Hale*, 463 U.S. 491 (1983).

First, AFA's reliance on cases decided under the NLRA is misplaced. Although the NLRA, which applies to most private employers *except* railroads and airlines, bears some superficial resemblance to the Railway Labor Act ("RLA"), the two Acts differ in very significant respects. The courts have recognized that the RLA and NLRA impose quite different obligations upon the parties. *See, e.g., Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 391 (1969); *General Committee of Adjustment v. Southern Pacific Co.*, 320 U.S. 338, 342-43 (1943); *Ruby v. American Airlines, Inc.*, 323 F.2d 248, 256 (2d. Cir. 1963), *cert. denied*, 376 U.S. 913 (1964); *International Association of Machinists v. Northeast Airlines, Inc.*, 536 F.2d. 975, 977 (1st Cir.), *cert. denied*, 429 U.S. 961 (1976). The NMB's sweeping exclusive jurisdiction over representation issues under the RLA and the RLA's requirement of a single carrier-wide representative for each craft or class have no counterparts under and, indeed, are contrary to the procedures under the NLRA. By contrast under

the NLRA, the National Labor Relations Board ("NLRB") has only primary, *not* exclusive, jurisdiction over representation issues, *Carpenters' Local Union No. 1478 v. Stevens*, 743 F.2d 1271, 1278-79 (9th Cir. 1984), *cert. denied*, 471 U.S. 1015 (1985), and a union may be certified to represent any "employer unit, craft unit, plant unit or subdivision thereof." 29 U.S.C. § 159(b). Thus, the RLA is quite different from the NLRA in the area of representation issues and cases under the NLRA are simply not germane in this area.

Second, AFA's attempt to analogize the *W.R. Grace*, *supra*, and *Belknap*, *supra*, cases to the instant case is also erroneous. Both cases involved an employer's conflicting contractual obligations under two contracts which the employer had entered into. The instant case, however, does not involve such a conflict between two contracts. Rather the instant case, unlike *W.R. Grace* and *Belknap*, involves a government agency's exclusive statutory jurisdiction over the subject matter and its decision exercising that jurisdiction. That is the critical difference and makes those cases of no relevance here. The purported contractual obligation that AFA asserts here is in conflict with the NMB's exclusive jurisdiction over representation disputes (as well as the NMB's decision). In *W.R. Grace* and *Belknap*, none of the employer's agreements were in conflict with any law, agency jurisdiction, or agency decision.

The issue here is not, as AFA suggests, a contractual defense of impossibility of compliance with the collective bargaining agreement, but rather the issue here is jurisdiction. The RLA, not Western's or Delta's alleged breach of contract, divests courts and

arbitrators of jurisdiction to decide any aspect of this representation dispute, including damage remedies. Regardless of how the representation dispute arises, the RLA vests exclusive jurisdiction over such matters in the NMB.[1]

AFA also argues that there is nothing wrong in a carrier having to forego entering into an otherwise desirable merger as a consequence of the carrier being potentially liable in damages for an alleged breach of a successorship clause by the acquired carrier. AFA's Brief, at 10. AFA ignores the fact that mergers like this one are often the only way to protect the jobs of employees at the acquired carrier and also maintain continuity of service to the public, because the acquired carrier cannot survive alone. Moreover, AFA's theory has the same purpose and would accomplish the same result as the injunctive relief, which the D.C. Circuit acknowledged it has no authority to grant. A carrier, as a practical matter, would be unable to proceed with a transaction in the face of con-

[1] If *W.R. Grace* or *Belknap*, cited by AFA, somehow supported AFA's argument that there is jurisdiction here, then the many cases cited by Delta in its Petition (See in particular pages 11 and 15 to 20 of the Petition) would have had the opposite result, as would presumably the Ninth Circuit's decision that the related cases there were moot and the D.C. Circuit's earlier decision that AFA's representation claims are moot. *See e.g., Air Line Employees Association v. Republic Airlines, Inc.*, 798 F.2d 967 (7th Cir.) (per curiam), *cert. denied*, 479 U.S. 962 (1986) (where the carrier had entered into a collective bargaining agreement which was alleged to have been breached by its merger agreement, but the Seventh Circuit, like many other courts, found no jurisdiction because the union's contract grievance claim involved a representation dispute). Neither *W.R. Grace* nor *Belknap* confers jurisdiction in this or any of those previously cited cases.

flicting and unpredictable rulings regarding the parties' rights and obligations with respect to questions of representation.

Nor does AFA's suggestion that Delta—and other acquiring carriers—could avoid such liability by structuring the transaction so that both carriers continue as separate operating entities, avoid the problem. That suggestion is also part of the injunctive relief which AFA (and the other two unions in the Ninth Circuit) originally sought and were denied based on all prior court and NMB decisions on the issue. In addition, most acquisitions only make economic sense if the two carriers can be fully merged, particularly in the case of a financially weak or failing carrier. Further, trying to keep the two carriers separate would subject the purchasing carrier to potentially conflicting arbitrations, as well as NMB proceedings instituted by rival unions. It was to avoid such conflicts that Congress gave the NMB exclusive jurisdiction over all disputes involving representation rights. These points are more fully expressed in the Brief of the Airline Industrial Relations Conference and the Air Transport Association of America as *Amici Curiae* Supporting Certiorari, at 13-15.

3. *Conclusion.* Delta respectfully requests that this Petition be granted to resolve the conflicts raised by this case, which are of vital national importance to our critical air and rail transportation industries.

October [illegible], 1983

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